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No. 83-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE AS *AMICUS CURIAE*

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QUESTION PRESENTED

Did the denial of petitioners' application for a bench trial violate their Fifth and Sixth Amendment right to fair trial and their First Amendment right of free speech where: (i) the trial judge ruled that a bench trial would be "fairer" and, (ii) the government withheld its consent because petitioner had publicly accused it of religious prejudice?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iv

INTEREST OF THE AMICUS..... 2

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT..... 5

ARGUMENT

A JURY TRIAL IS NOT THE PREFERRED TRIBUNAL UNDER THE CONSTITUTION OR THE SINGER RULE WHEN A DEFENDANT WHO IS THE SUBJECT OF PASSION, PREJUDICE, AND ADVERSE PUBLIC FEELINGS SEEKS A BENCH TRIAL INSTEAD..... 7

Introduction..... 7

A. The Singer Exception Applies Here..... 9

B. Due Process Requires the Use of the Concededly Fairer Available Tribunal.... 17

C. The Government's Veto of Bench Trial was Unjustified, Improper, and in Violation of Petitioners' First Amendment Rights..... 19

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases	Page
Berger v. United States, 295 U.S. 78 (1935)	5, 19
Kent v. Dulles, 357 U.S. 116 (1958)	2
Lamont v. Postmaster General, 381 U.S. 301 (1965)	2
Lutwak v. United States, 344 U.S. 604 (1953)	17
Press-Enterprise Company v. Superior Court of California, Riverside County, 52 U.S.L.W. 4113 (1984)	17
Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966)	10
Singer v. United States, 380 U.S. 24 (1965)	passim
United States v. Ballard, 322 U.S. 78 (1944)	7
Uphaus v. Wyman, 360 U.S. 72 (1959)	2

Constitutional Provisions

U.S. Const. amend. I.....passim

U.S. Const. amend. V.....passim

U.S. Const. amend. VI.....passim

Statutes and Rules

Fed. R. Crim. P. 23(a)..... 4

Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 54 (codified at 28 U.S.C. 1861, et seq.)..... 10

Miscellaneous

Brief for the United States, Singer v. United States, 380 U.S. 24 (1965)..... 9, 10

I Holmes-Pollack Letters 74 (M. Howe ed. 1941)..... 12

H.R. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 1792, 1794, 1795..... 10

Note, Government Consent to Waiver of Jury Trial Under Rule 23(a) the Federal Rules of Criminal Procedure, 65 Yale L.J. 1032 (1956)..... 15

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Pursuant to Rule 36.1 of the Rules of this Court, the National Emergency Civil Liberties Committee files this

brief in support of the pending petition for certiorari. The attorneys of record for the parties have consented in writing to the filing of this brief. Their letters are on file with the Clerk of this Court.

INTEREST OF THE AMICUS

The National Emergency Civil Liberties Committee is a non-profit organization created in 1951 for the purpose of protecting the constitutional rights of American citizens. It has done so through its counsel, in litigation in this Court, including Kent v. Dulles, 357 U.S. 116 (1958); Lamont v. Postmaster General, 381 U.S. 301 (1965); and Uphaus v. Wyman, 360 U.S. 72 (1959). Its Legal Committee has authorized the filing of this brief because it believes that the

denial of a bench trial in this case presents a serious violation of the Fifth and Sixth Amendment rights to a fair trial and the First Amendment right of freedom of speech. It does not address the other important issues raised by the petition for certiorari.[1]

STATEMENT OF THE CASE

Amicus will not seek to repeat all the facts of this case since they are fully set out in the petition for certiorari. Three facts are particularly relevant to the single question presented by the amicus: an extraordinary community hostility toward defendants and their Church, defendants' awareness of

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[1] We advise the Court that the writer of this brief and his firm have represented the Unification Church in litigation unrelated to this case.

it, and their consequent attempt to avoid its effect by waiving trial by jury. The trial judge, also aware of the community's hostility, expressly stated that a bench trial would be "fairer". (T.1760-1761).[2/] Nonetheless, the judge denied the motion for a bench trial under Rule 23(a) of the Federal Rules of Criminal Procedure when it became clear that the government would refuse to give its consent to the waiver. The government had insisted upon a jury trial, its stated purpose being to "defuse the public criticism that had been leveled" by the petitioner against his prosecution. (App. 7). The government asserted that a jury trial would give a better

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[2/] "T" refers to the transcript of the record filed in the court below; "App." to the Second Circuit's opinion appended to the petition for certiorari; "A" to the pleadings in the court below.

"appearance...of a fair trial" than a bench trial and would protect the judge from public criticism. Id.

SUMMARY OF ARGUMENT

Extraordinary community hostility towards defendants and their religious group entitles them, under the due process clause of the Constitution, to a bench trial, particularly where the trial judge agrees that such a trial would be fairer. Such are the "compelling circumstances" contemplated by this Court in Singer v. United States, 380 U.S. 24, 37 (1965).

The special responsibility of federal prosecutors under this Court's decision in Berger v. United States, 295 U.S. 78 (1935) requires them to consent to a bench trial where it concededly

would be fairer to the defendants in view of the community's hostility. The government's refusal to consent was admittedly based upon the petitioner Moon's public assertion that the criminal prosecution was religiously and racially motivated. This is in effect a punishment, in violation of the First Amendment, for the public expression of one's views. The government had other less restrictive means to meet this public statement. Its argument that the public would have more confidence in a jury trial than in a bench trial has no basis in fact.

ARGUMENT

A JURY TRIAL IS NOT THE PREFERRED TRIBUNAL UNDER THE CONSTITUTION OR THE SINGER RULE WHEN A DEFENDANT WHO IS THE SUBJECT OF PASSION, PREJUDICE, AND ADVERSE PUBLIC FEELING SEEKS A A BENCH TRIAL INSTEAD.

Introduction

"If one could be sent to jail because a jury in a hostile environment found [his religious] teachings false, little indeed would be left of religious freedom." United States v. Ballard, 322 U.S. 78, 87 (1944).

These words were perhaps never more relevant in the trial of a religious figure than in the trial of Reverend Sun Myung Moon. This case, however complex factually and legally on other issues, is rather simple on the issue of whether, under the precise circumstances surrounding him and his unpopular

religious movement, Reverend Moon received the fair trial to which he was entitled. The issue comes down to whether or not the trial court should have granted Reverend Moon's waiver of a jury trial in favor of a bench trial.

It appears to this amicus that the state's interest in the mode of trial should be to provide the greatest possibility of a fair tribunal to such a defendant. A defendant is therefore entitled to a bench trial when a bench trial would be "fairer". It goes without saying that the motivation behind the creation of the jury method in the first place was out of concern for fairness.

A. The Singer Exception Applies Here

The difficulty with the position the government has taken is that this Court anticipated this type of case and situation twenty years ago in Singer v. United States, 380 U.S. 24 (1965). In words which precisely describe defendants' circumstances, the Court noted that there may be "situations where 'passion, prejudice,...public feeling' or some other factors may render impossible or unlikely an impartial trial by jury." Id. at 37-38.

There is more to the background of the Court's opinion in Singer than Singer's own argument. The Court had before it an amicus brief of a young woman student who had sought a bench trial because of the pervasive prejudice then existing in the venue of trials

against white persons, in the South, particularly women, active in the civil rights movement.[3] That brief argued the need for a bench trial where there was community prejudice. The government accepted the validity of that position by:

> "Assuming arguendo that a denial of a non-jury trial under some circumstances might be so unfair as to present constitutional questions under the due process clause of the First Amendment * * *". Brief for the United States in

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[3] Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966). The Rabinowitz case, presenting a factual situation comparable to the Moon case, was ultimately decided on a related issue -- the unfairness of the jury selection method then prevalent in many parts of the United States. The Court's holding led to the new jury selection statute, Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 54 (codified at 28 U.S.C. 1861, et seq.). The House Report on the bill referred several times to the Rabinowitz case. H.R. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 1792, 1794, 1795.

Opposition at 6, Singer v. United States, 380 U.S. 24 (1965).

This Court foresaw that circumstances may exist -- although they did not reach that height in Singer[4/] -- where due process requires acceptance of a defendant's waiver of jury trial over the government's objections. Those circumstances do exist here, where the community's prejudice against petitioners was not denied by the government nor by the courts below; indeed, the trial judge made a finding unquestioned by the Court

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4/ Singer "gave no reason for wanting to forego jury trial other than to save time." 380 U.S. at 38. Because Singer's reason for seeking a bench trial was merely one of convenience, the Court ruled that it need not reach the issue of whether Singer was denied an impartial trial when the government refused to consent to his waiver.

of Appeals that a bench trial would have been "fairer" because of community hostility.5/

The Court of Appeals' response to the petitioners' Singer argument was that "compelling circumstances are not demonstrated simply by claims of an atmosphere poisoned by a negative press." (App. 9-10). The Court simply missed the point. The petitioners' claim, as we understand it, was not limited to a "negative press", which often can be

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5/ Mr. Justice Holmes believed that "there is a growing disbelief in the jury as an instrument for the discovery of truth. The use of it is to let a little popular prejudice into the administration of law -- (in violation of their oath)." I Holmes-Pollack Letters 74 (M. Howe ed. 1941). While one may not agree with the Justice on the general proposition, a bench trial is clearly mandated in a case where there was far more than "a little popular prejudice."

sifted out and cured on voir dire.[6/] Petitioners' claim was much more far-reaching: that of pervasive community hostility in the sensitive and specially protected area of religion. Again neither the prosecution nor the courts below doubted this hostility. It seems to us that where, as here, such hostility has gone beyond an acceptable level, a defendant willing to waive his right to a jury trial in favor of a bench trial is entitled to do so as a matter of due process.

Even the trial judge recognized at the conclusion of the voir dire that "to the extent people know [Reverend] Moon

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6/ The Roth Survey, introduced in advance of voir dire, showed the extent of this hostility. The overwhelming majority of the 1,000 persons surveyed knew of and were negatively predisposed toward Reverend Moon. (A.818, 822).

and his religion it is true that their attitudes are negative." (T.1758). Nevertheless, the trial judge proceeded with the jury because he thought that the jury that was impanelled was

> "if not totally free from bias, by and large capable of putting aside the bias... [But] in attempting to get an unbiased jury, the leaning has been heavily towards people who don't read much, don't talk much and don't know much because they are obviously the persons who start off with the least bias...I would have thought it fairer to have this case tried without a jury...having the jury make the determination of guilty or innocen[ce] is just fine by me. But I do think I would feel better about the fairness from the position of the defendants had they been granted a non-jury trial." (T.1759-61).

It seems obvious that a judge who is free from bias -- or at least more capable of putting that bias aside -- a

reasonable premise of our argument, is a more appropriate trier of the facts than a jury which has some bias, even though it is predicted that they will by and large be capable of putting that bias aside. "By and large" is hardly an acceptable standard for an unbiased trier of the facts in our constitutional scheme where the defendant wants to waive a jury trial and where the option of a bench trial is otherwise available.7/ Nor, incidentally, do we believe that the government's veto of a jury trial can properly require petitioners to be tried, in the district court's words, before

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7/ See also Note, Government Consent to Waiver of Jury Trial Under Rule 23(a) of the Federal Rules of Criminal Procedure, 65 Yale L.J. 1032, 1039 (1956) (indicating that, in the case of a highly unpopular defendant, when the alternative of trial by the court is available, trial by a jury with any amount of bias will not suffice).

"people who don't read much, don't talk much and don't know much." See p. 13 supra. This is hardly the jury of one's peers in a complicated tax case.

In any event, amicus does not ask that this Court go any further than the exception already carved out in Singer which recognized the possibility of "compelling circumstances" requiring a bench trial. We submit that if this Singer exception is to have any value or meaning for defendants who justifiably fear public hostility, this is one case where it must be applied.

B. Due Process Requires the Use of the Concededly Fairer Available Tribunal

The Court of Appeals began its opinion in this case by saying that the "defendants are only entitled to a 'fair trial but not a perfect one'", quoting Lutwak v. United States, 344 U.S. 604, 619 (1953). Admittedly no one can insist on the perfect trial, but due process requires that a defendant who is willing to waive a jury trial be given the fairer available tribunal. As Chief Justice Burger stated in Press - Enterprise Company v. Superior Court of California, Riverside County, 52 U.S.L.W. 4113, 4115 (1984), "No right ranks higher than the right of the accused to a fair trial." In light of the trial court's repeated assertions that a bench trial would have been "fairer", it is consistent with this

high esteem given to fairness that the trial court should have granted petitioners' motion for bench trial, regardless of the government's veto. We do not dispute that, in normal circumstances, the jury is preferred as the "tribunal which the Constitution regards as most likely to produce a fair result."[8/] Singer v. United States, 380 U.S. at 36. However, in circumstances where the defendant is the subject of "passion, prejudice", id. at 37, and undisputed public hostility, rendering a jury trial less likely to be fair, the constitutionally preferred mode of trial is, a fortiori, a bench trial.

8/ The rule should not be jury trial for the sake of jury trial. Rather the emphasis must be on "fairness."

C. The Government's Veto of Bench Trial was Unjustified, Improper, And In Violation of Petitioners' First Amendment Rights.

This Court's decision in Singer had one other relevant component: a recognition of "the prosecutor's special responsibility as a servant of the law." Id. at 37, quoting Berger v. United States, 295 U.S. at 88. The Court had "confidence that it is in this light that [the prosecutor's veto power under Rule 23(a)] will continue to be evoked by government attorneys." 380 U.S. at 37 (emphasis supplied). Said the Court:

> Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal

> prosecutors would demand a jury trial for an ignoble purpose. Id.

We do not presume to characterize the motive of the prosecution in this case for withholding its consent to a jury waiver in the face of a judicial willingness to accept that waiver. Nor are we faced, as was the defendant in Singer, with the need to conjecture or speculate on what these motives were, since in the instant case they were candidly expressed by the prosecution.

First, the prosecution asserted the need for a jury verdict to meet the petitioners' claim of government prejudice. This seems a most questionable reason for trying a defendant before a concededly more prejudiced tribunal. The petitioners had a constitutional right to express their belief that they

were being prosecuted because of their race or religious affiliation. This Court is aware of the religious and political trials throughout history in which similar claims have been made by those facing inquisitional or political heresy trials. It seems strange, even aberrant, for the government to impose what in this context is a penalty because of the petitioners' adherence to a traditional defense to a government indictment, that is, to speak out in the forum of public opinion. The courts below expressed doubt that "the government's reason for refusing to consent to a bench trial was impermissibly to punish Moon for exercising First Amendment rights." (App. 8). But this is exactly what the government did. Its expressed rationale -- to give the public

confidence through a jury -- does not obfuscate its equally expressed purpose of protecting itself from Reverend Moon's exercise of free speech. Nor does it obfuscate its effect -- that is, a tribunal less likely to give petitioners the fairer mode of trial which they would have received had Reverend Moon not criticized the government. If petitioner Moon had not made his statement, there is nothing whatever to indicate that the prosecution -- whose statement here we accept at face value -- would have denied him the bench trial he sought.

There are less drastic means than denying a "fairer" trial to meet a petitioner's public claims of religious persecution. The government was entitled to make an equally forceful denial of religious persecution. It could have

stated that a grand jury, free from government control, had handed down the indictment. It could have specified other criminal proceedings brought in the past against churches and church leaders in order to show its non-discriminatory approach to the petitioners. These and other alternative means would have been less drastic than depriving the petitioners of a trial concededly fairer than the one insisted upon by the government.

This brings us to the government's second point: that the public would have more confidence in a jury trial than in a bench trial. (App. 7). This is a most doubtful speculation and one which denigrates the respect which the public quite properly has for our federal judges. The government may have greater

confidence in a jury verdict in a case such as this, but that is certainly not true of the public. Indeed, the public is often even in awe of judges in contrast to its view of its fellow citizens.

We are even more puzzled by the government's expressed desire to spare the trial judge from being placed in an "untenable" position. (App. 7). This, too, denigrates both the character and the high responsibilities of our judges and unjustifiably questions their ability, even their courage, to carry out their sworn duty. The trial judge was quite capable of protecting himself. Indeed his reason for yielding to the government's veto was not on the ground

of self-protection, but rather in the erroneous belief that he lacked the power to override that veto.

CONCLUSION

The petition for certiorari should be granted so that the Court can address the petitioners' due process and First Amendment rights.

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